

# This Was Not Just Another Ultra Vires Judgment!

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A few days ago, 27 retired judges of the Polish Constitutional Tribunal have issued a [statement](#) concerning the judgment K 3/21 of 7 October 2021. We are both among its signatories. With this article, we hope to contribute to the clarification of the false statements contained in that judgment, its oral explanations and statements of representatives of political authorities, regarding the difficult matters of coexistence of Polish law and European Union law.

## **1. It is not true that the judgment of the Constitutional Tribunal of 7 October 2021 was issued in order to guarantee the supremacy of the Constitution over EU law, since such a position of the Constitution has been sufficiently established in the previous case law of the Tribunal (in cases K 18/04, K 32/09, SK 45/09)**

Membership in the European Union notwithstanding, the Constitution is the supreme law of the Republic of Poland, according to Article 8 para. 1 of the Constitution (judgments: K 18/04, K 32/09, SK 45/09). In case K 18/04, it was held (and judgment K 3/21 reiterated this point) that two autonomous legal orders exist side by side in a Member State. They interact and a potential conflict is not excluded.

According to judgment K 18/04, it is the duty of the authorities to take steps to avoid a collision, in particular by interpreting the law. This interpretation should respect the autonomy of the two legal orders to the maximum extent possible.

Under no circumstances should a conflict be resolved by:

- recognizing the supremacy of the EU norm over the constitutional norm;
- nor by replacing the constitutional norm with a Union norm;
- or by limiting the scope of the constitutional norm to the area not covered by the regulation of Union law.

Next, as the Constitutional Tribunal has already stated in the judgment K 18/04, an interpretation of internal law that is „friendly to European law“, eliminating a possible conflict between Union and Polish law, could not:

- lead to results that are contrary to the express wording of the constitutional norms;
- diminish the minimum guarantee functions performed by the Constitution. The protection of individual rights and freedoms by the Constitution sets a minimum and impassable threshold.

If the irremovable contradiction actually occurred – the constitutionally empowered Polish organ(s), would have to decide:

- either to amend the Constitution,
- or to cause changes in the Union law,
- or on Poland's withdrawal from the European Union.

These rules, already existing in the jurisprudence of the Constitutional Tribunal, constitute a guarantee mechanism ensuring the supremacy of the Constitution of the Republic of Poland.

Contrary to the assertions and assumptions made as the starting point in the judgment K 3/21, EU law required neither in the past nor in the present any abrogation of the principles set forth above in judgments K 18/04 and K 32/09 and SK 45/09.

The judgment K 3/21 asserts that under the norms of the TEU:

- the organs of the European Union were to act beyond the limits of the competences transferred by the Republic of Poland in the Treaties,
- the Constitution ceased to be the supreme law of the Republic of Poland, having priority of validity and application,
- the Republic of Poland could not function as a sovereign and democratic state.

This is manifestly untrue. In particular, this cannot be inferred from Articles 1, 4 and 19(1)(2) TEU which, for that very reason, were found by the Constitutional Tribunal to be inconsistent with the Polish Constitution.

The ruling K 3/21 assumes a priori that there is an insurmountable contradiction between the Polish Constitution and the challenged Article 19 para. 1 para. 2 TEU (provision of remedies sufficient to ensure effective legal protection in fields covered by Union law). However, no effort was made to remove this alleged conflict through interpretation.

The aim of the proceedings before the Constitutional Tribunal was not to resolve any existing, real, irremovable contradiction between the standards of the Polish Constitution on the one hand and those of EU law on the other. The real aim of the judgment was to provide cover for ordinary national legislation in order to lower the standard of judicial independence below the level required by both the Polish

Constitution and EU law. In this way, the illusion of a contradiction between EU law and the Polish Constitution was artificially created.

## **2. It is not true that the judgment of the Constitutional Tribunal of 7 October 2021 itself falls within the competence of the Tribunal and is consistent with the Constitution**

The judgment K 3/21 declared the following provisions of the Treaty on European Union unconstitutional: the first and second paragraphs of Article 1 in connection with Article 4(3) and the second paragraph of Article 19(1) in connection with Article 2 and Article 4(3) TEU. The Constitutional Tribunal went beyond the scope of the motion of the Prime Minister. The ruling is of an interpretative nature: the application of these provisions in the sense adopted by the CJEU would be unconstitutional. However, the scope of adjudication in the case decided by the Constitutional Tribunal is a matter of EU law, the final and binding interpretation of which is the exclusive jurisdiction of the CJEU. The Constitutional Tribunal has not submitted any preliminary questions to the CJEU, despite the fact that such an obligation arises both from EU law (Article 267, third paragraph of the TFEU) as well as the earlier case-law of the Constitutional Tribunal (SK 45/09). It should be emphasized that the legal construction of preliminary references and judgments is, in the light of the case law of the Constitutional Tribunal, consistent with the Constitution (see judgments of the Constitutional Tribunal K 18/04, P 37/05).

## **3. It is not true that EU law and the previous case law of the CJEU question or violate the supremacy of the Constitution in the Polish legal order**

## **4. It is not true that the CJEU requires Polish courts to desist from observing and applying the Constitution as the supreme law of the Republic**

In none of the judgments concerning Poland, no matter if it's infringement or referral proceedings, has the CJEU held that Polish courts have an obligation not to apply the Polish Constitution, or an obligation to derogate from its provisions. The CJEU case law concerned the incompatibility of Polish laws (statutes) with EU law, such as the Act on the Supreme Court, the Act on the National Council of the Judiciary, the Law on the System of Common Courts, or the so-called muzzling act. The CJEU has even supported the Polish courts in their efforts to restore the compatibility of laws and practice with the Polish Constitution, e.g. with the principle of separation of powers (Article 10), independence and autonomy of the judiciary (Article 173), independence of the judiciary (Article 178), and the principle of the primacy of international law, including EU law, in the event of conflict with laws (Article 91(2))

and (3)). This effect of the CJEU case law is particularly important in view of the failure of the current Constitutional Tribunal to protect the Constitution and the resulting inadequate protection of human and civil rights.

Union law and the jurisprudence of the CJEU indicate the minimum and necessary elements of effective judicial protection in fields covered by Union law. Without independent courts established in accordance with the law, judicial protection loses its meaning and, at the same time, its ability to fulfil its role: safeguarding the Union legal order and the rights of individuals under that law. Clearly, these requirements cannot violate the Polish Constitution, which contains similar guarantees. For this reason, they also cannot infringe the supremacy of the Constitution in the territory of Poland.

## **5. It is not true that the application of EU law by Polish courts cannot be reconciled with their application of the Constitution**

Polish law, including the Constitution, and European Union law are legal orders based on identical axiological premises (as the Constitutional Tribunal stated in its judgment SK 45/09). Up to 2016, the Constitutional Tribunal developed ways to avoid conflicts between both. It also formulated the principles of support for European integration and EU-friendly interpretation of the Constitution. As has also been mentioned, in the event of an inconsistency between the norms of the Constitution and those of Union law that cannot be eliminated through interpretation, one of the ways to remove such inconsistency is to amend the Constitution. This is what happened in 2006, when Article 55 of the Constitution was amended following the judgment of the Constitutional Tribunal in case P 1/05 (the European Arrest Warrant case). If the courts have doubts as to the interpretation of EU law they may, and sometimes should, turn to the CJEU with preliminary references.

**6. It is not true that the questioning by EU institutions of the breach by Polish statutes and practice of their application of the principles of independence of Polish judges, who also adjudicate in the fields covered by Union law, goes beyond the competence conferred on the European Union by Article 90(1) of the Constitution**

**7. It is not true that European Union law and the case-law of the CJEU encroach upon the regulation of the organisation of justice in Poland, since the defence of judicial independence is not part of the organisation of justice**

The organisation of the judiciary (types of jurisdiction, structure of courts, their jurisdiction, procedures) does not fall within the competences transferred to the European Union under Article 90(1) of the Constitution.

However, the scope of competence transferred to the European Union does include the obligation of Member States to establish the remedies sufficient to ensure effective legal protection in fields covered by Union law (Article 19(1), second subparagraph, TEU). Furthermore, everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal (Article 47(1) of the Charter of Fundamental Rights).

Poland, like the other Member States, has transferred to the Union, and thus to the CJEU, the competence to interpret the principle of effective legal (judicial) protection, and to verify whether Member States are complying with their Treaty obligation to provide it.

The independence of judges is a prerequisite and at the same time a fundamental component of effective legal protection and the fundamental right to an effective remedy before the courts. Judicial independence as a concept, and the criteria determining it, are not in itself part of the 'organisation of the judiciary' for which Member States remain competent. The fact that the Polish courts are also courts of the Union requires, by contrast, that the standard of judicial independence, which is a guarantee of the independence of the judiciary, should be the common denominator of the judiciary in the Member States. This means that the criteria for determining whether the requirements for judicial independence are met may be set out in CJEU case law. CJEU rulings function as a protective mechanism when interference by the national authorities can be qualified as excessive, disproportionate, causing new threats or stripping the guarantee mechanisms of

judicial independence of their substance. This type of action does not concern the regulation of the organisation of the judiciary.

## **8. It is not true that the judgment of the Constitutional Tribunal of 7 October 2021 will be able to produce legal effects other than exerting pressure on the judicial activity of Polish judges and threatening them with disciplinary proceedings**

In the judgment in question, the Constitutional Tribunal ruled on the inconsistency with the Constitution of the basic provisions of the TEU, as formulated by the applicant – the Prime Minister of the Republic of Poland. It should be noted, however, that such formulations are not reflected in the actual case law of the CJEU.

The judgment of the Constitutional Tribunal does not and cannot result in a change of the provisions of the TEU, nor of the case-law of the CJEU, as this does not depend on the Polish authorities. Moreover, the Tribunal's interpretation of the CJEU is not binding on the Polish courts. Only the CJEU is authorised to give a binding interpretation of EU law (Art. 19(1) TEU, second sentence). However, it can be expected (and feared) that the judgment in question will result in pressure being exerted on Polish judges to understand EU law as interpreted by the Constitutional Tribunal and to refuse to apply certain CJEU judgments. Judges could be threatened through the disciplinary regime of the so-called Muzzle Law of 2019. The statutory provisions providing that the content of rulings of judges of common courts can be qualified as a disciplinary offence were deemed by the CJEU in judgment C 791/19 in breach of Article 19(1) of the TEU. However, this judgment has not yet been implemented. Judges may also be threatened by administrative measures, such as removing them from office and transferring them to another judicial department, which are used for the same repressive purposes as the disciplinary mechanism.

The CJEU judgment in case C-487/19 also formulated requirements with respect to proceedings leading to effects analogous to disciplinary proceedings. It should be added that, in the light of judgment C-83/19, the entire disciplinary system is dysfunctional.

## **9. It is not true that the Constitutional Tribunal has the authority to review the constitutionality of CJEU rulings and to decide whether Poland, as a Member State, should selectively respect CJEU case law**

The interpretative ruling in the K 3/21 judgment declares the application of the reviewed provisions of the TEU unconstitutional in particular cases. This formula of unconstitutionality is, in a way, an external facade: it conceals the fact that the Constitutional Tribunal's judgment undermines specific judgments of the CJEU.

These are a series of rulings defining the standard of effective legal protection on the basis of Article 19 TEU. However, CJEU judgments are final and binding within the EU, and the principle is universal.

In the final part of the oral reasons for the ruling, the judge-rapporteur in case K 3/21 explicitly stated that the Tribunal does not rule out that in the future it will directly review the constitutionality of the CJEU rulings, including removing them from the Polish legal system. Such a declaration was also included in the communication published by the Constitutional Tribunal after the judgment K 3/21.

Pursuant to the model of constitutional judicature adopted in Poland, the Constitutional Tribunal does not, however, have the authority to review the constitutionality of individual judicial decisions (argument from Article 188 of the Constitution). This applies to Polish rulings, and even more so to rulings by a supranational court such as the CJEU (additional arguments are provided by Articles 9 and 90(1) of the Constitution, as well as by the earlier jurisprudence of the Constitutional Tribunal, in particular the judgment K 18/04).

## **10. It is not true that constitutional courts of other Member States in matters concerning relations between national law and EU law have issued judgments similar to the one issued by the Constitutional Tribunal on October 7, 2021.**

On this issue in particular there are many distortions in the statements made by politicians from the ruling coalition and some commentators.

Indeed, the constitutional courts of several Member States have issued judgments in which they have taken a position different from that of the CJEU judgments. However, this is still an exceptional phenomenon, and not a frequent one, as could be inferred from the comments made by representatives of the ruling camp in Poland. There are also fundamental differences in terms of substance.

Firstly, in none of the Member States other than Poland the principle of primacy of EU law over national law has been generally questioned. On the contrary, the jurisprudence of the constitutional courts clearly emphasises the validity of this principle, even in the case of an exceptional departure from the CJEU jurisprudence.

Secondly, the judgments of the courts in other countries concerned strictly defined contentious issues that arose in the interpretation of the domestic constitution and EU law, mainly in particular areas of substantive law. These judgments related primarily to secondary EU law and challenged neither the Treaties themselves (as the K 3/21 judgment does) nor the CJEU's jurisprudence on the very foundations on which the Union is based, such as the obligation of Member States to provide effective legal protection in fields covered by EU law and the resulting guarantees of judicial independence.

Thirdly, the judgments of the constitutional courts of other Member States have generally served to raise the level of protection of citizens, whereas the judgment in case K 3/21 lowers that level.

Fourthly, the divergences between the jurisprudence of the constitutional courts of other Member States and the jurisprudence of the CJEU were of a temporary nature and were usually eliminated as a result of changes in domestic law or its interpretation. They did not result in a Member State challenging their fundamental duties of loyalty to the Union.

Fifthly, before the judgments in question were issued by constitutional courts of other Member States, the CJEU had the opportunity to take a position by issuing preliminary rulings.

